Office-Supreme Court, U.S.
FILED
JUL 19 1985
ROBERT L. STEVAS,
CLERK

No. 85-128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD S. HOFFER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RALPH RUEBNER, ESQ.
Associate Professor of Law,
The John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737 Ext. 568
Counsel of Record for Petitioner

Of Counsel:
RANDY K. JOHNSON, ESQ.
ALMS & MILLER, LTD.
257 East Main Street, Suite 301
Barrington, Illinois 60010
(312) 381-3550
(Licensed to Practice before
the Supreme Court of Illinois)

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED FOR REVIEW

Do the principles of implied acquittal and collateral estoppel, which are embodied in the double jeopardy clause of the Fifth Amendment, prohibit the retrial of a defendant for murder where (1) a jury had previously found him guilty of involuntary manslaughter and voluntary manslaughter (which are lesser-included offenses of murder) and murder; (2) the state supreme court found that the jury verdicts on the lesser-included offenses were logically and legally inconsistent with the verdict on the greater offense; and (3) there is abundant evidence in the record to support the jury's verdict finding the defendant guilty of the least culpable lesser-included offense?

TABLE OF CONTENTS

	PAGE(S)
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
THE MANNER IN WHICH THE FEDERAL CONSTITUTIONAL CLAIMS WERE RAISED	7
REASONS FOR GRANTING CERTIORARI ..	8
CONCLUSION	16

APPENDIX

A—Opinion of the Illinois Appellate Court	A1 - A17
B—Opinion of the Illinois Supreme Court ..	B1 - B13
C—Order of the Illinois Supreme Court, May 31, 1985, Denying Rehearing, and Stay Order, June 10, 1985	C1 - C3
D—Jury Instructions and Verdicts	D1 - D12

TABLE OF AUTHORITIES

Cases PAGE(S)

Ashe v. Swenson, 397 U.S. 436 (1970) 11, 14, 15

Green v. United States, 355 U.S. 184 (1957) ... 13, 14, 16

Ohio v. Johnson, ____ U.S. ____, 81 L.Ed. 2d 425 (1984) 16

People v. Hairston, 46 Ill. 2d 348, 263 N.E. 2d 840 (1970) 15

People v. Hoffer, 122 Ill. App. 3d 13, 460 N.E. 2d 824 (1984) 2, 15

People v. Hoffer, 106 Ill. 2d 186, 478 N.E. 2d 335 (1985) 2, 10, 11, 12

Price v. Georgia, 398 U.S. 323 (1970) 12, 13, 14

State v. Akers, 278 Mo. 368, 213 S.W. 424 (1919) . 15

United States v. Powell, ____ U.S. ____, 105 S.Ct. 471 (1984) 8, 9

Constitutional Provisions

Amendment V 3, 8, 9, 12, 13, 14, 15, 16

Amendment XIV 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD S. HOFFER,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

INTRODUCTION

To the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

May It Please The Court:

Donald S. Hoffer, Petitioner, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the Illinois Supreme Court.

OPINIONS BELOW

Donald Hoffer was convicted by a jury of murder, voluntary manslaughter, and involuntary manslaughter in the Circuit Court of Kane County, Illinois. Following post-trial motions, the trial court vacated the judgments of conviction of voluntary and involuntary manslaughter and sentenced Hoffer to a twenty year prison term. On appeal, the Illinois Appellate Court, Second District, reversed all three convictions and remanded the cause for a new trial finding that the verdicts on the two lesser-included offenses (voluntary manslaughter and involuntary manslaughter) were legally and logically inconsistent with the verdict on the greater offense (murder). See *People v. Hoffer*, 122 Ill. App. 3d 13, 460 N.E.2d 824 (1984), attached as Appendix A. Hoffer and the People appealed to the Illinois Supreme Court. The Illinois Supreme Court concluded that the jury verdicts were legally and logically inconsistent, and affirmed the Appellate Court by reversing the murder conviction and remanding the cause for a new trial. See *People v. Hoffer*, 106 Ill. 2d 186, 478 N.E.2d 335 (1985). See opinion attached as Appendix B.

The Illinois Supreme Court denied Hoffer's petition for rehearing on May 31, 1985, without further opinion. See Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Illinois Supreme Court was entered on March 29, 1985. A Petition for Rehearing was filed timely and was denied without further opinion on May 31, 1985. This Petition is filed within sixty (60) days of the Illinois Supreme Court's order denying rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V

No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy for life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Donald Hoffer was charged by indictment with three counts of murder. (Ill. Rev. Stat., ch. 38, secs. 9-1(a)(1), 9-1(a)(2)) After a jury trial, the jury returned signed guilty verdicts for murder (Ill. Rev. Stat., ch. 38, secs. 9-1(a)(1), 9-1(a)(2) (1981)); voluntary manslaughter (Ill. Rev. Stat., ch. 38, sec. 9-2(b) (1981)); and involuntary manslaughter (Ill. Rev. Stat., ch. 38, sec. 9-3(a) (1981)). (Vol. I, C. 159-161) The trial court entered judgment on each verdict. (Vol. I, C. 177) Defense counsel filed post-trial motions in which he argued that the three verdicts were legally and logically inconsistent requesting that the judgments entered by the trial judge on murder and voluntary manslaughter be vacated and thereby allowing the judgment of conviction for involuntary manslaughter to remain intact. (Vol. I, C. 181-183; 195-199) After hearing the post-trial motions, the trial court vacated the judgments of conviction of voluntary manslaughter and involuntary manslaughter, entered judgment on the murder verdict, and sentenced Donald Hoffer to a prison term of twenty years.

On May 18-19, 1982, Catherine Einsiedel, Donald Hoffer's sister, was living with him and her daughter, Shannon. (R. 208-210) Harold (Ed) Peters, the deceased, was the

father of Shannon. Einsiedel and Peters lived together for three years, (R. 208-210) but she moved into Donald Hoffer's home whenever she and Peters fought. (R. 379)

On the evening of May 18, 1982, Tony Charbauski visited Einsiedel. (R. 212, 213) While Charbauski and Einsiedel were upstairs in her bedroom, Peters came into the house by removing a window. (R. 213, 237) Peters went upstairs and discovered the two. He became angry and tried to get Charbauski to fight. (R. 438) As Charbauski left the house, Peters threatened and attempted to kick him. (R. 438, 440) Peters came back into the house when Einsiedel informed him that she wanted to end their relationship. (R. 215) Peters broke the dust cover of Donald Hoffer's stereo, told Einsiedel he would pay the damage, gave her some money, and left. (R. 216)

Donald Hoffer arrived home approximately one-half hour later. (R. 217) Hoffer and Peters were friends and Hoffer was aware of his sister's relationship with Peters. (R. 390) Hoffer also knew that Peters possessed guns and was skilled in the use of firearms. Peters had previously threatened or spoken of threatening people, including Donald Hoffer, with guns. (R. 393, 394, 407, 423-425) He also knew that Peters became much more violent when he had been drinking. (R. 398) When Hoffer arrived home that night, Einsiedel told him of the incident with Peters. (R. 403, 384) Hoffer told her he was tired of Ed's conduct. (R. 390) Peters had been calling or coming to the house two or three times per week, usually in an intoxicated state, in the middle of the night. (R. 391)

Hoffer went to bed and had begun to doze off when he heard Peters' truck pull up. (R. 391) Hoffer got up. Feeling that he should be prepared if Peters had a weapon, he told Einsiedel that Peters was there. (R. 392, 393)

Donald Hoffer testified that at this time he was afraid for himself, Einsiedel, and Shannon. He got his shotgun and went downstairs. (R. 392-394, 426, 430, 432) Hoffer opened the house door and saw Peters leaning against the porch rail. (R. 395) Peters was wearing a tucked in T-shirt and jeans, standing about five feet from Hoffer. (R. 222) They had a brief conversation about the dust cover and then Peters asked to talk to Einsiedel. (R. 396) Einsiedel indicated that she did not want to speak with him, and Hoffer told him to leave. (R. 397) Hoffer thought Peters was intoxicated. Peters became angry, turned around, started walking down the steps, put his hands up in the air, and made a remark about Hoffer shooting him. (R. 397-399) As Peters turned around, Einsiedel called Hoffer's name and said "Don't shoot." (R. 399) It is unclear from the record whether Einsiedel was directing this remark to Hoffer or to Peters. According to Einsiedel, Hoffer's gun was in the "aim" position when he shot Peters. (R. 227) She testified that before the shooting Peters had a cigarette in his hand and his arms were raised in the air. (R. 223) On cross-examination, Einsiedel said she could not see Peters for a few seconds, just prior to the shooting, because she was looking at her brother and at the gun. (R. 250, 262) For a month preceding the shooting, Peters carried a pocket knife in a holster on his belt. (R. 263)

Hoffer testified that he had turned toward his sister's voice as Peters walked down the steps. (R. 399) Hoffer then turned and looked back at Peters. He saw him lower his hands and begin to turn around, a movement which made Hoffer think that Peters was going to get a gun. (R. 399) At that time, Hoffer's shotgun was leaning against his shoulder and was pointing straight up into the air. (R. 398) When he saw Peters' movement, Hoffer lowered

the shotgun and began to pull it to his shoulder. At that point the gun discharged. (R. 399) Hoffer testified that he did not aim the gun. (R. 418) He also said that before the gun went off Peters was facing him. (R. 400)

An autopsy was performed by Dr. James Habegger of Aurora, Illinois. It revealed that Peters had been shot once in the side of the back. (R. 345, 346, 357) On cross-examination, Dr. Habegger agreed that variables other than the position of the body affect the trajectory of a bullet. (R. 360) It was the physician's opinion that Peters was shot from a lower level or that he was bending down when the bullet struck him. (R. 348) Hoffer also testified that Peters "had dropped down like he was going for something." (R. 400) Peters' blood alcohol level at the time of his death was .197 and his urine alcohol level was .231. (R. 362)

The jury was instructed on murder, voluntary manslaughter, and involuntary manslaughter. (R. 597-693) See Appendix D.

THE MANNER IN WHICH THE FEDERAL CONSTITUTIONAL CLAIMS WERE RAISED

The fifth amendment double jeopardy claim was first raised in the trial court in Donald Hoffer's post-trial motions. This was Petitioner's first opportunity to raise his claim. He next presented it to the Illinois Appellate Court, Second District, and lastly to the Illinois Supreme Court. At no time has Hoffer requested a new trial. His request for relief has been consistent throughout the proceedings below. Rather than seeking a new trial on murder and

on the lesser-included offenses of voluntary manslaughter and involuntary manslaughter, he has asserted that the double jeopardy clause protects the jury verdict finding him guilty of involuntary manslaughter. He has maintained that he is entitled to an enforcement of that verdict without a new trial. That can be accomplished by remanding the case to the trial court for imposition of sentence on the involuntary manslaughter verdict and judgment.

REASONS FOR GRANTING CERTIORARI

This petition raises a question of first impression for this Court to consider. The opinion of this Court in *United States v. Powell*, ____ U.S. ____, 105 S.Ct. 471 (1984), reserved this precise question for future consideration. We ask this Court to determine whether principles of implied acquittal and collateral estoppel and the fifth amendment double jeopardy clause prohibit the retrial of a defendant for murder, where a jury had previously found him guilty of involuntary manslaughter and voluntary manslaughter, both lesser-included offenses of murder under state law, and murder; the state supreme court found that the jury verdicts on the lesser-included offenses were logically and legally inconsistent with the murder verdict; and there is abundant evidence in the record to support the jury's verdict finding the defendant guilty of the least culpable lesser-included offense, namely, involuntary manslaughter.

Justice Rehnquist, who delivered the opinion of the Court in *United States v. Powell*, stated:

> "Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other." (Citations omitted)

United States v. Powell, 105 S.Ct. at 479, fn. 8. This is precisely the situation here. *Powell* simply held that when a jury acquitted the defendant of conspiracy to possess cocaine and possession of cocaine but found her guilty of using the telephone to facilitate those offenses, "there is no reason to vacate [defendant's] conviction merely because the verdicts cannot rationally be reconciled." *Id.* at 479. *Powell* did *not* address the proper resolution of inconsistent guilty verdicts in a situation where a conviction on a lesser-included offense logically and legally excludes a conviction on the greater offense. Here, the involuntary manslaughter verdict is legally and logically inconsistent with both the murder verdict and the voluntary manslaughter verdict. It logically and legally excludes a finding of guilt on the two greater offenses. The evidence abundantly supports the jury verdict finding Hoffer guilty of involuntary manslaughter. That verdict must be given constitutional respect, and the remand order for a new trial for murder violates double jeopardy principles.

Under Illinois law, correctly stated by the Illinois Supreme Court in the case at bar, voluntary manslaughter is a lesser-included offense of murder, and involuntary manslaughter is a lesser-included offense of murder and of voluntary manslaughter. The Illinois Supreme Court also found that the offenses here are distinguished only by the diminishing degree of mental culpability necessary to sustain each, and that these mental states are mutually inconsistent.

An "included offense" is defined in Illinois as an offense which "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged * * *." (Ill. Rev. Stat. 1981, ch. 38, par. 2-9(a).) The offenses of murder, voluntary manslaughter and involuntary manslaughter are distinguished only by the diminishing degree of mental culpability necessary to sustain each. While murder and voluntary manslaughter (unreasonable belief) both require proof of intent or knowledge (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a)(1), 9-1(a)(2), 9-2(b)), the offense of voluntary manslaughter is committed only when the defendant acts with an unreasonable belief that the killing was justified. This mental state is considered less culpable, and, as such, voluntary manslaughter is considered an included offense of murder. Similarly, involuntary manslaughter is considered an included offense of voluntary manslaughter and murder because it involves an unintentional killing of a human being without lawful justification while recklessly performing acts which are likely to cause death or great bodily harm. Ill. Rev. Stat. 1981, ch. 38, par. 9-3(a).

The mental states involved in each of these offenses are mutually inconsistent. Where a determination is made that one exists, the others, to be legally consistent, must be found not to exist. This is made especially clear in the instant case, where the jury received an issue instruction on murder which required the State to prove that the defendant *did not believe* that circumstances existed which justified the use of force. (IPI Criminal No. 27.01 (7.02 and 25.05) (1963).) By finding the defendant guilty of murder, therefore, the jury specifically found that defendant did not believe his conduct was justified. At the same time, by finding him guilty of voluntary manslaughter, the jury determined that he did believe, although unreasonably, that his conduct was justified. Addi-

> tionally, the jury concluded that the defendant killed another, intentionally or knowingly (murder, voluntary manslaughter) while simultaneously finding that defendant recklessly but unintentionally caused the death of the victim (involuntary manslaughter). (Emphasis in original).

People v. Hoffer, 106 Ill. 2d 186, 194-195 (1985).

While Hoffer agrees with the foregoing analysis, he disagrees with the Illinois Supreme Court's new trial order and the rejection of his implied acquittal and collateral estoppel claims. The Illinois Supreme Court stated its conclusions this way:

1. IMPLIED ACQUITTAL

> To apply this rationale [of implied acquittal] to the facts of the instant case is to ignore the jury's express findings of guilt as to the offenses of murder and voluntary manslaughter. We agree with the appellate court, therefore, that, under the circumstances of this case, application of the doctrine of implied acquittal would be fictional.

People v. Hoffer, 106 Ill. 2d at 198.

2. COLLATERAL ESTOPPEL

> Defendant further argues that the principle of collateral estoppel, which is embodied in the double jeopardy clause (*Ashe v. Swenson* (1970), 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189), bars defendant's retrial for murder and voluntary manslaughter. The court in *Ashe* stated that the principle of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (397 U.S. 436, 443, 25 L.Ed. 2d 469, 475, 90 S.Ct. 1189, 1194.) Defendant maintains that in finding him guilty of involuntary manslaughter, the jury

> found that he had acted unintentionally and recklessly. Thus, defendant concludes, this factual finding negates the accusation that he acted with intent or knowledge and estops the State from relitigating those mental states anew.
>
> The jury, in the instant case, had to make a factual determination as to the mental state of the defendant at the time of the homicide. By finding defendant guilty of the charged offense as well as the two included offenses, the jury necessarily found that the defendant possessed three distinct and mutually inconsistent mental states at the time of the offense. As such, we found the verdicts legally inconsistent. Implicit in the rule of law which requires a new trial when multiple guilty verdicts are legally inconsistent is the invalidity of the underlying factual findings upon which the verdicts were made. In the instant case, there has been no valid and final judgment and thus no ultimate factual determination upon which to rely for purposes of collateral estoppel.

People v. Hoffer, 106 Ill. 2d at 198-199.

The Illinois Supreme Court's implied acquittal analysis is faulty for the following reasons. The ultimate finding by the trier of fact in this case, Donald Hoffer's jury, based on the evidence marshalled by the prosecutor and the defense, is that Hoffer had acted recklessly and unintentionally, and therefore, is guilty of involuntary manslaughter. Inasmuch as the ultimate finding by the jury is that the defendant had acted recklessly and unintentionally, the guilty verdict for involuntary manslaughter logically and legally excludes guilt on the greater offenses of voluntary manslaughter and murder. This verdict thereby operates as an implied acquittal of murder and voluntary manslaughter. The double jeopardy clause protects the integrity and validity of that verdict and the reprosecution of Donald Hoffer for murder violates that basic right. *Price v. Georgia*, 398 U.S. 323, 328-329 (1970) The

Illinois Supreme Court's determination that the "implied acquittal" doctrine is inapplicable where a jury returns a verdict of guilty on a greater offense in addition to finding the defendant guilty of lesser-included offenses is constitutionally wrong because "[t]he Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict." *Price v. Georgia*, 398 U.S. at 331.

It is Donald Hoffer's position that whether or not the jury was "silent" on the greater offenses is totally irrelevant to the double jeopardy analysis required in this case. The legally significant factor is the ultimate finding by the jury that Hoffer acted recklessly and unintentionally, and this factual finding conclusively negates and excludes statutory elements necessary to sustain a conviction on the greater offenses. This comports with the teaching of this Court in *Price v. Georgia*, 398 U.S. 323 (1970). In *Price*, the defendant was tried for murder but found guilty of voluntary manslaughter. Following reversal of that conviction on appeal, he was retried for murder. Once again he was found guilty of voluntary manslaughter. He appealed his conviction on double jeopardy grounds, alleging that he had suffered prejudice by being retried for murder, notwithstanding the fact that his jury was "silent" on the murder verdict form. In discussing the "implicit acquittal" rule of *Green v. United States*, 355 U.S. 184 (1957), the *Price* Court noted:

> First, the [*Green*] Court considered the first jury's verdict of guilty on the second-degree murder charge to be an "implicit acquittal" on the charge of first-degree murder. Second, and more broadly, the Court reasoned that petitioner's jeopardy on the greater charge had ended when the first jury "was given a full opportunity to return a verdict" on that charge and instead reached a verdict on the lesser charge. (citation omitted) *Under either of these premises*, the

> holding in the *Kepner* case—that there could be no appeal from an acquittal because such a verdict ended an accused's jeopardy—was applicable.

Price v. Georgia, 398 U.S. at 328-329. (Burger, C.J.) (emphasis added).

Under either premise, the jury verdict finding Donald Hoffer guilty of involuntary manslaughter must be protected without any qualification as to whether or not the jury remained "silent" on the greater offenses of murder or voluntary manslaughter. The double jeopardy clause must be read *broadly* and *liberally*. "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." *Green v. United States*, 355 U.S. at 198.

The Illinois Supreme Court is also wrong in rejecting Donald Hoffer's collateral estoppel argument. The finding of guilty by the jury of involuntary manslaughter negates and excludes the charge that Hoffer had acted with intent or knowledge, which are necessary elements of murder and voluntary manslaughter, respectively. It also estops the State of Illinois from litigating those mental states anew. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). In *Ashe*, this Court recognized that the double jeopardy clause embodies the principle of collateral estoppel. "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." This Court warned that "[t]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe v.*

Swenson, 397 U.S. at 444. In deciding whether to apply principles of collateral estoppel, the reviewing court must "examine the *record* . . . and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson*, 397 U.S. at 444 (emphasis added). It is abundantly clear that there is an adequate factual basis in this record for the jury's verdict finding Donald Hoffer guilty of involuntary manslaughter. The Illinois Appellate Court determined that there is a factual basis in this record to support the jury's involuntary manslaughter verdict. See *People v. Hoffer*, 122 Ill. App. 3d 13, 460 N.E. 2d 824, 825 (1984). Hoffer's testimony also supports the jury's verdict:

> "When I saw him turn around and reach like he was reaching up for a gun, I then lowered the shotgun down, reaching up with my other hand to grab the stock and bringing it down. I went down kind of lower and pulled back to my shoulder, which in turn the gun went off." (R. 399) "I didn't aim." (R. 418)

Under these circumstances, collateral estoppel should be applied to prevent the retrial of Donald Hoffer.

Finally, the Illinois Supreme Court's rationale for rejecting the collateral estoppel claim is archaic and constitutionally wrong because it rests upon a faulty "mutuality" of verdicts theory. The court cited its own precedent first stated in *People v. Hairston*, 46 Ill. 2d 348, 263 N.E. 2d 840, 849 (1970), citing *State v. Akers*, 278 Mo. 368, 213 S.W. 424, 425 (1919). The application of a "mutuality" analysis is totally at odds with modern double jeopardy jurisprudence and was put to rest by this Court in *Ashe v. Swenson*, 397 U.S. at 443. Clearly, the principles of collateral estoppel as embodied in the double jeopardy clause forbid the retrial of Donald Hoffer.

CONCLUSION

This Court has stated that a prosecutor should be allowed one full and fair opportunity to marshall all the evidence he has on the greater and lesser-included offenses for the factfinder to consider and to render judgment. *Ohio v. Johnson*, ____ U.S. ____, 81 L.Ed. 2d 425, 435 (1984). Here, the State of Illinois was indeed allowed that opportunity and its interests were fully satisfied. To now allow the State of Illinois to once again force Donald Hoffer to run the gauntlet on a murder charge would violate the "letter and spirit" of the double jeopardy clause. *Green v. United States*, 355 U.S. at 198.

For the reasons stated herein, Donald S. Hoffer respectfully prays that a Writ of Certiorari issue to the Supreme Court of Illinois.

Respectfully submitted,

RALPH RUEBNER, ESQ.
Associate Professor of Law,
The John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737 Ext. 568
Counsel of Record for Petitioner

Of Counsel:

RANDY K. JOHNSON, ESQ.
ALMS & MILLER, LTD.
257 East Main Street, Suite 301
Barrington, Illinois 60010
(312) 381-3550
(Licensed to Practice before
the Supreme Court of Illinois)

APPENDIX A

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
DONALD HOFFER,
Defendant-Appellant.
Second District No. 82-888
Reversed and remanded.
Opinion filed February 22, 1984.

* * *

JUSTICE HOPF delivered the opinion of the court:

Following a jury trial in the circuit court of Kane County verdicts were returned finding defendant guilty of murder (Ill. Rev. Stat. 1981, ch. 38, par. 9-1(a)(1)), voluntary manslaughter (unreasonable belief) (Ill. Rev. Stat. 1981, ch. 38, par. 9-2(b)), and involuntary manslaughter (Ill. Rev. Stat. 1981, ch. 38, par. 9-3(a)), all in connection with the shooting death of Harold E. Peters. The trial court entered judgment on each of the verdicts, and defendant thereafter filed his timely post-trial motion asserting that the verdicts were inconsistent because of the different mental states involved in each offense. The trial court subsequently denied the motion, vacated the convictions for voluntary manslaughter and involuntary manslaughter, and retained the judgment for the conviction of murder, sentencing defendant to 20 years' imprisonment.

Defendant appeals, contending that his constitutional rights to be free of double jeopardy (U.S. Const., amend. V; Ill. Const. 1970, art. I, sec. 10) were violated when

the court entered a judgment and sentenced him upon a charge of which he was impliedly acquitted. On this basis, he seeks to have the murder conviction vacated and the involuntary manslaughter conviction reinstated. We will consider this issue as well as a related one which we perceive to be even more troublesome; *i.e.*, whether the jury verdicts were inconsistent so as to require reduction of defendant's offense or reversal of his conviction.

Harold Peters, referred to at trial as "Ed," had been romantically involved with defendant's sister, Catherine Einsiedel, and was the father of Einsiedel's daughter, Shannon. Einsiedel had lived with Peters intermittently over the course of their three-year relationship, removing herself to defendant's home when she and Peters fought. At the time of the homicide, Einsiedel had left Peters, and she and Shannon had been staying with defendant for three or four months. However, Einsiedel continued to maintain some relationship with Peters.

On the evening of May 18, 1982, Einsiedel received a visit from Tony Charbauski. While Charbauski and Einsiedel were upstairs in her bedroom, Peters came into the house, admitting himself through a window. Peters went upstairs, and upon finding Einsiedel and Charbauski, became agitated and tried to get Charbauski to fight. As Charbauski was leaving the house, Peters threatened and attempted to kick him. When Peters came back inside the house, Einsiedel informed him that she wanted to end their relationship. As Peters left, he broke the dust cover of defendant's stereo, told Einsiedel he would pay for the damage, and gave her some money.

Defendant returned home approximately one-half hour later. Defendant and Peters were close friends, and defendant was aware of the relationship and problems between

Einsiedel and Peters. Defendant knew Peters possessed guns, was skilled in the use of firearms, and previously threatened or spoke of threatening people, including defendant, with guns. Defendant testified that Peters was much more violent when he had been drinking. When defendant arrived home on the night in question, Einsiedel told him of the incident with Peters. Defendant indicated that he was sick of such behavior by Peters. Peters had been calling or coming to the house two or three times per week, usually in an intoxicated state, in the middle of the night.

Defendant testified that he went to bed and had started to fall asleep when he heard Peters' truck pull up. Defendant got up, feeling that he should be prepared if Peters attempted to break in, and told Einsiedel that Peters was there. Defendant, who testified that he was afraid for himself, Einsiedel, and Shannon, got his shotgun and went downstairs. When he opened the door, defendant found Peters outside, leaning against the porch rail. Peters was wearing only a tucked-in T-shirt and jeans, and was standing about five feet from defendant. After a brief conversation with defendant about the dust cover, Peters asked to talk to Einsiedel. According to defendant, Einsiedel, who had followed defendant downstairs, indicated that she did not want to speak with Peters, and defendant told Peters to leave. Peters, who defendant thought was intoxicated, became angry. Peters turned around and started walking down the steps, putting his hands up in the air, and making some remark about defendant shooting him. What occurred next is in conflict.

Einsiedel testified that as Peters turned around, she yelled at her brother not to shoot, the shotgun then went off and Peters fell to the ground. When asked what was the position of the gun as defendant shot Peters, the witness indicated it was in an "aim" position. According to

Einsiedel, Peters had only a cigarette in his hand at the time, and his arms were raised up in the air. She testified that Peters fell about five feet from where he was originally standing on the proch. Einsiedel ran over to Peters; she did not see any weapons on or near him. Peters was pronounced dead by paramedics who arrived on the scene shortly thereafter. On cross-examination, Einsiedel stated she could not see Peters for a few seconds just prior to the shooting because she was looking at her brother and the gun. She stated for the month preceding the shooting Peters had carried a pocket knife in a holster on his belt.

Defendant testified that as Peters began walking down the porch steps, defendant got worried and removed the safety device from the shotgun. Immediately before the shot was fired, defendant heard his sister say, "Don." Defendant started to turn towards her and she said, "Don't shoot!" Defendant turned and looked back at Peters and saw him lower his hands and begin to turn around, a movement which made defendant think that Peters was going to get a gun. Defendant testified that at that time the shotgun was leaning against his shoulder and was pointing straight up into the air. Upon seeing Peters' movement, defendant lowered the shotgun and began to pull it to his shoulder, at which time the gun discharged. Defendant stated he did not aim the gun. He stated that before the gun went off, Peters was facing him. An autopsy revealed that Peters had been shot once in the back.

The jury was instructed on murder, voluntary manslaughter, and involuntary manslaughter. The issues instructions on voluntary manslaughter required the jury to find that defendant believed, albeit unreasonably, that circumstances existed which justified his use of force.

(Illinois Pattern Jury Instruction (IPI), Criminal, No. 27.01 (2d ed. 1981).) The issue of defendant's belief was also submitted as part of the issues instruction for murder and required the jury to find that defendant did not believe justifying circumstances existed. (IPI Criminal No. 27.01 (1968).) Finally, the jury was instructed that by definition the offense of involuntary manslaughter was an unintentional one, although a lack of intent was not included as an issue in the issues instruction on that offense. (IPI Criminal Nos. 7.07, 7.08 (2d ed. 1981); Ill. Rev. Stat. 1981, ch. 38, par. 9-3(a).) Guilty verdicts were returned on each of these charges, and defendant was sentenced only upon the greater offense of murder. The convictions for voluntary manslaughter and involuntary manslaughter were vacated.

Because of the constitutional ban against double jeopardy (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, sec. 10), multiple prosecutions or punishments for the same offense are barred. (Ill. Rev. Stat. 1981, ch. 38, par. 3-4(a); *Illinois v. Vitale* (1980), 447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260.) As a corollary to this principle, the Criminal Code of 1961 provides that "[a] conviction of an included offense is an acquittal of the offense charged." (Ill. Rev. Stat. 1981, ch. 38, par. 3-4(a).) It is well established that voluntary manslaughter and involuntary manslaughter are lesser included offenses of murder (*People v. Fausz* (1983), 95 Ill. 2d 535, 449 N.E.2d 78; *People v. Arndt* (1972), 50 Ill. 2d 390, 280 N.E.2d 230; *People v. Ellis* (1982), 107 Ill. App. 3d 603, 437 N.E.2d 409; *People v. Cowen* (1979), 68 Ill. App. 3d 437, 386 N.E.2d 435), and involuntary manslaughter is a lesser included offense of voluntary manslaughter. (*People v. Towers* (1974), 17 Ill. App. 3d 467, 308 N.E.2d 223.) Defendant therefore contends that his conviction of involuntary manslaughter

operated as an acquittal of the charges of murder and voluntary manslaughter and that convicting and sentencing defendant for murder violated his constitutional right to be free from double jeopardy. We disagree.

This identical argument was considered and rejected by the court in *People v. Kettler* (1983), 112 Ill. App. 3d 1061, 1067, 446 N.E.2d 550. Noting that a jury may, and frequently does, return guilty verdicts upon both the charged offense and its lesser included offense (see *People ex rel. Carey v. Scotillo* (1981), 84 Ill. 2d 170, 417 N.E.2d 1356; *People v. Bone* (1982), 103 Ill. App. 3d 1066, 432 N.E.2d 329; *People v. Burnette* (1981), 97 Ill. App. 3d 1015, 423 N.E.2d 1193), the court concluded that section 3-4(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 3-4 (a)) applies only to those instances where the jury returns a verdict upon the lesser offense and is silent as to the charged offense. (*People v. Kettler* (1983), 112 Ill. App. 3d 1061, 1067, 446 N.E.2d 550; see also *People v. Keith* (1978), 66 Ill. App. 3d 93, 383 N.E.2d 655; *People v. Roberts* (1976), 36 Ill. App. 3d 811, 345 N.E.2d 132.) In this situation, the jury's silence on the greater offense will be deemed an "implied acquittal" of that offense. *Green v. United States* (1957), 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221.

We agree with the reasoning of the *Kettler* decision and accordingly find no "implied acquittal" of either murder or voluntary manslaughter in the instant case. Here, the jury was not silent on either of these offenses but, to the contrary, returned a specific finding of guilt on each of them. Under these circumstances, "the doctrine of 'implied acquittal' would be literally fictional." *People v. Kettler* (1983), 112 Ill. App. 3d 1061, 1067, 446 N.E.2d 550; see also *People v. Krogul* (1983), 115 Ill. App. 3d 734, 737, 450 N.E.2d 20.

We reach this conclusion mindful of several recent cases which at first glance appear to support defendant's position that the "implied acquittal" doctrine applies here. We find those cases distinguishable. In *People v. Stuller* (1979), 71 Ill. App. 3d 118, 389 N.E.2d 593, the jury was instructed on both murder and unreasonable belief voluntary manslaughter. The issues instruction for voluntary manslaughter required the jury to find that defendant believed circumstances existed which justified his actions. The issues instruction for murder, however, omitted the element required under these circumstances, that defendant did not believe justifying circumstances existed. (*Stuller*; see also *People v. Vega* (1982), 107 Ill. App. 3d 289, 437 N.E.2d 919.) The jury returned verdicts of guilty on both the murder and voluntary manslaughter charges. The trial judge vacated the voluntary manslaughter verdict and entered judgment on the murder conviction. On appeal, the murder conviction was reversed and the cause remanded to the circuit court with instructions to enter a finding of guilty of voluntary manslaughter and to impose an appropriate sentence. The appellate court reasoned that the specific finding on the voluntary manslaughter count that defendant believed justifying circumstances existed, which finding was supported by sufficient evidence, negated the requisite intent for murder. We view the *Stuller* decision as limited to its facts and do not believe it stands for the broad proposition now advanced that conviction of a lesser included offense automatically negates the requisite intent for the greater inclusive offense. Rather, we consider the *Stuller* rationale to apply in those instances where the jury has made a specific factual finding, supported by the evidence, on an issue in the lesser included offense which was not considered by the jury in its deliberations on the greater inclusive offense, and where the specific finding has the effect of negating a requisite element of the greater offense.

People v. Fox (1983), 114 Ill. App. 3d 593, 449 N.E.2d 261, also relied upon by defendant, offers little guidance on the double jeopardy question presented here and does not contradict our interpretation of *Stuller*. (*People v. Stuller* (1979), 71 Ill. App. 3d 118, 389 N.E.2d 593.) In *Fox* the jury returned guilty verdicts on both murder and voluntary manslaughter. The trial court sentenced defendant only on the murder charges. Relying upon *Stuller*, the appellate court vacated the murder conviction, affirmed the voluntary manslaughter conviction, and remanded the cause for imposition of an appropriate sentence. In so doing, the court stated that the jury's specific finding of provocation negated the requisite intent for murder and thus the conviction of voluntary manslaughter had the effect of an implied acquittal of the graver charge of murder. (*People v. Fox* (1983), 114 Ill. App. 3d 593, 595, 449 N.E.2d 261.) In reaching this conclusion, however, the court did not discuss the issues instruction given to the jury for murder and whether the jury was specifically requested to find that defendant did not act under provocation in order to sustain the charge. We therefore find the *Fox* case to be not uninstructive here.

In the case at bar the jury was instructed on murder, voluntary manslaughter and involuntary manslaughter. The issues instruction for involuntary manslaughter required the jury to find the mental state of recklessness in order to prove defendant guilty of that charge. (IPI Criminal No. 7.08 (2d ed. 1981); Ill. Rev. Stat. 1981, ch. 38, par. 9-3(a).) "Recklessness" is defined as a "[conscious disregard of] a substantial and unjustifiable risk that circumstances exist or that a result will follow, * * * and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in

the situation." (Ill. Rev. Stat. 1981, ch. 38, par. 4-6.) Thus, a person charged with involuntary manslaughter is charged with consciously disregarding an unjustified risk that death or great bodily harm to another will result. In returning a guilty verdict on involuntary manslaughter, the jury specifically found that the mental state of recklessness existed here. This finding finds support in the record, since defendant testified to an accidental discharge of the gun. However, the jury also returned guilty verdicts on murder and voluntary manslaughter and thus also specifically found that defendant possessed the requisite mental state of either intent or knowledge. (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a)(1), (2), 9-2(b).) Such a finding also finds ample support in the record.

Defendant argues that the guilty verdict on the involuntary manslaughter charge necessarily resulted in a finding that defendant's act was unintentional (see *People v. Wolski* (1980), 83 Ill. App. 3d 17, 403 N.E.2d 528), and that this finding negates the requisite intent for voluntary manslaughter and murder. While it is true that by definition the offense of involuntary manslaughter occurs when one unintentionally kills another (Ill. Rev. Stat. 1981, ch. 38, par. 9-3(a)), it does not necessarily follow that a lack of intent is a necessary element of the offense. (See *People v. Bolden* (1978), 59 Ill. App. 3d 441, 447 n.2, 375 N.E.2d 898, stating in *dictum* that absence of intent is not an element of the offense; but *contra*, *People v. Bonzi* (1978), 65 Ill. App. 3d 927, 933, 382 N.E.2d 1300, suggesting that absence of intent is an element of the offense.) The only mental state required to sustain a conviction of involuntary manslaughter is that of recklessness (*People v. Cates* (1982), 111 Ill. App. 3d 681, 689, 444 N.E.2d 543), and a finding of recklessness does not, in our opinion, necessarily negate a finding of knowledge or

intent. (See *People v. Better* (1975), 33 Ill. App. 3d 58, 66-67, 337 N.E.2d 272.) "Mental states of knowledge and recklessness are not susceptible to clear distinction." (*People v. Gross* (1977), 52 Ill. App. 3d 765, 771, 367 N.E.2d 1028.) Nevertheless, because the jury is presumed to have considered the instructions as a whole (*People v. Vega* (1982), 107 Ill. App. 3d 289, 294, 437 N.E.2d 919), and because of defendant's testimony on this issue, we agree that the verdict of guilty on this charge implies a finding of a lack of intent. Even so, it is clear that the jury was not silent on the intent issue when it returned the guilty verdicts on murder and voluntary manslaughter and, in fact, specifically found that the requisite intent for those crimes existed. Under these circumstances, we find little support for defendant's position in the *Stuller* and *Fox* cases and accordingly find that the conviction of involuntary manslaughter did not amount to an implied acquittal of the murder and voluntary manslaughter offenses.

While we conclude that the doctrine of "implied acquittal" is not applicable here, we nevertheless must consider what effect, if any, the apparent inconsistency in the verdicts has on defendant's conviction.

Traditionally, Illinois law provided that verdicts were not required to be logically consistent so long as they were legally consistent. (*People v. Hairston* (1970), 46 Ill. 2d 348, 263 N.E.2d 840, *cert. denied* (1971), 402 U.S. 972, 29 L. Ed. 2d 136, 91 S. Ct. 1658; *People v. Taylor* (1976), 36 Ill. App. 3d 898, 344 N.E.2d 742.) Verdicts are legally inconsistent where they necessarily involve the conclusion that the same essential elements of each offense were found both to exist and not to exist. (*People v. O'Malley* (1982), 108 Ill. App. 3d 823, 439 N.E.2d 998; *People v. Murray* (1975), 34 Ill. App. 3d 521, 340 N.E.2d 186.) Logical inconsistency is present where the verdicts demon-

strate both the acceptance and rejection of one party's theory of the case. 34 Ill. App. 3d 521, 340 N.E.2d 186.

For some period of time legal thinking abounded that the supreme court in its ruling in *People v. Dawson* (1975), 60 Ill. 2d 278, 326 N.E.2d 755, *cert. denied* (1975), 423 U.S. 835, 46 L. Ed. 2d 54, 96 S. Ct. 61, had effectively overruled *Hairston* as to the invalidity of legally inconsistent verdicts. (*People v. Hairston* (1970), 46 Ill. 2d 348, 263 N.E.2d 840, *cert. denied* (1971), 402 U.S. 972, 29 L. Ed. 2d 136, 91 S. Ct. 1658.) This reasoning was followed in certain appellate court decisions. (See *People v. Harris* (1982), 104 Ill. App. 3d 833, 433 N.E.2d 343; *People v. Jimerson* (1979), 69 Ill. App. 3d 403, 388 N.E.2d 10; *People v. Murray* (1975), 34 Ill. App. 3d 521, 340 N.E.2d 186; *People v. O'Malley* (1982), 108 Ill. App. 3d 823, 439 N.E.2d 998.) The supreme court in the recent case of *People v. Frias* (1983), 99 Ill. 2d 193, 198-99, 457 N.E.2d 1233, totally laid this legal theory to rest by specifically ruling that it had not in its *Dawson* decision overruled *Hairston*.

There is a further distinguishing feature between the case before us and *Dawson* and the cases that applied its rationale, that being in *Dawson* there was a conviction on one charge and an acquittal on others. (*People v. Dawson* (1975), 60 Ill. 2d 278, 326 N.E.2d 755, *cert. denied* (1975), 423 U.S. 835, 46 L. Ed. 2d 54, 96 S. Ct. 61.) Here, the defendant was convicted of every offense upon which the jury was instructed, obviously negating any theory of lenity, and in our opinion would have required reversal regardless of the interpretation of *Dawson*. However, the supreme court in *Frias* noted the circumstances of inconsistent verdicts where the defendant was found guilty of all charges, and stated:

> "In *People v. Hairston* (1970), 46 Ill. 2d 348, 361, this court, while recognizing that legally inconsistent

> verdicts could not stand, held that where inconsistent verdicts of guilty are returned, a reversal and new trial on all counts must follow." *People v. Frias* (1983), 99 Ill. 2d 193, 203, 457 N.E.2d 1233.

In a situation such as this one, we believe inconsistency in the verdicts implies confusion on the part of the trier of fact. In the present case, both types of inconsistency are suggested by the verdicts, as is evidenced by the elements of the offenses and the instructions to the jury.

The elements of the offense of murder are the killing of an individual without lawful justification, combined with the intent to kill or do great bodily harm or the knowledge that there is a strong probability of that result. (Ill. Rev. Stat. 1981, ch. 38, par. 9-1(a).) Because self-defense may justify the use of force (Ill. Rev. Stat. 1981, ch. 38, par, 7-1), self-defense is an affirmative defense to the charge of murder and, where raised by the defendant, must be disproved by the State to establish the offense. (*People v. Pappas* (1978), 66 Ill. App. 3d 360, 383 N.E.2d 1190, *cert. denied* (1979), 444 U.S. 843, 62 L. Ed. 2d 55, 100 S. Ct. 85; *People v. Ortiz* (1978), 65 Ill. App. 3d 525, 382 N.E.2d 303.) Where the defendant has intentionally or knowingly killed an individual, but acts with an unreasonable belief that the killing was justified, *e.g.*, as self-defense, the offense committed is voluntary manslaughter, rather than murder. (Ill. Rev. Stat. 1981, ch. 38, par. 9-2(b); *People v. Ellis* (1982), 107 Ill. App. 3d 603, 437 N.E.2d 409; see *People v. Fausz* (1983), 95 Ill. 2d 535, 449 N.E.2d 78.) The jury was so instructed. Additionally, the jury was instructed that, to establish guilt of murder, the State was required to prove that defendant did not believe that circumstances existed which justified the use of force. This instructional element, formerly part of the

standard instructions in cases where a self-defense claim was raised in a murder prosecution (IPI Criminal No. 27.01 (1968)), has been deleted from the form instructions for such cases. (IPI Criminal No. 27.01 (2d ed. 1981).) However, this instruction represents a correct statement of the law (*People v. Vega* (1982), 107 Ill. App. 3d 289, 437 N.E.2d 919), which is designed to make the jury aware of the distinction between the crimes of murder and voluntary manslaughter. *People v. Stuller* (1979), 71 Ill. App. 3d 118, 389 N.E.2d 593.

The jury's verdict finding defendant guilty of voluntary manslaughter necessarily implies that the jury concluded that defendant believed, although unreasonably, that circumstances existed which justified his action. (*People v. Goodwin* (1981), 98 Ill. App. 3d 726, 424 N.E.2d 425; *People v. Stuller* (1979), 71 Ill. App. 3d 118, 389 N.E.2d 593; see *People v. Fox* (1983), 114 Ill. App. 3d 593, 449 N.E.2d 261 (voluntary manslaughter verdict implied finding of provocation).) This finding is both logically and legally inconsistent with the verdict that defendant was guilty of murder, which involved the determination, especially in light of the instructions given in the murder charge, that defendant did not believe that his conduct was justified.

There was evidence in support of voluntary manslaughter. Defendant knew Peters possessed guns, was skilled in the use of firearms, and previously threatened or spoke of threatening people, including defendant, with guns. Peters was intoxicated and had been belligerent toward others earlier that evening. Immediately before the shot was fired, defendant testified that he saw Peters lower his hands and begin to turn around, a movement which made defendant think that Peters was going to get a gun. Defendant had been afraid that Peters might try to harm him, Einsiedel, or Shannon. The unreasonableness of any

belief by defendant that self-defense was necessary is demonstrated by the fact that Peters was unarmed, his mode of dress, a T-shirt and jeans, would have revealed any weapon that was present, Peters and defendant were separated by a distance of several feet, there had been no physical fight between them, and Peters had not threatened to get a weapon.

On the other hand, there was also ample evidence to establish an intentional killing without a belief that the homicide was justifiable. This was the trial court's rationale for vacating the voluntary manslaughter and involuntary manslaughter convictions and allowing the murder conviction to stand. Although defendant denied the statement, his own sister testified that defendant stated that he was going to be ready for Peters when he returned, and told Peters that "I should blow you away." Einsiedel testified that defendant had the shotgun in an aimed position. Peters was unarmed, which should have been apparent to defendant, as he had a full view of Peters' body during their conversation and Peters was dressed in only a T-shirt and jeans. Peters was shot in the back, at a time when he was several feet from defendant and walking away from defendant. Just prior to being shot Peters had his back toward defendant and his arms in the air. The two men had not engaged in any physical fight. The safety device on defendant's shotgun was off when police recovered the weapon. Defendant had taken the safety device off of the shotgun, which was loaded, when Peters began walking down the porch stairs. The gun was in proper working order. Thus, the evidence could be viewed as negating any claim that defendant believed he was acting in self-defense (see *People v. Pappas* (1978), 66 Ill. App. 3d 360, 383 N.E.2d 1190, *cert. denied* (1979), 444 U.S. 843, 62 L. Ed. 2d 55, 100 S. Ct. 85) or that the shooting was unintentional.

Another inconsistency is presented due to the verdict finding defendant guilty of involuntary manslaughter. As previously stated, involuntary manslaughter is committed when a person unintentionally kills an individual without lawful justification while recklessly performing acts which are likely to cause death or great bodily harm. (Ill. Rev. Stat. 1981, ch. 38, par. 9-3.) The jury was instructed as to the intent requirements of murder and voluntary manslaughter and advised that the definition of involuntary manslaughter involved an unintentional act, although a lack of intent was not included as an issue in the issues instruction.

The distinction between these mental states suggests that the verdict finding defendant guilty of involuntary manslaughter is at least logically inconsistent with the guilty verdicts on the murder and voluntary manslaughter charges. While we believe, as previously stated, that a finding of recklessness does not necessarily negate a finding of knowledge (see *People v. Better* (1975), 33 Ill. App. 3d 58, 66-67, 337 N.E.2d 272), the jury's apparent simultaneous finding of intent and lack of intent is inherently irreconcilable, especially since defendant fired only one shot directed at a single victim and therefore cannot be found to have had more than one mental state. See *People v. Harris* (1982), 104 Ill. App. 3d 833, 433 N.E.2d 343; *People v. Roman* (1981), 98 Ill. App. 3d 703, 424 N.E.2d 794; *People v. Norris* (1969), 118 Ill. App. 2d 406, 254 N.E.2d 304.

The three guilty verdicts returned here thus demonstrate that the jury determined that defendant did (voluntary manslaughter) and did not (murder) believe that his conduct was justified, and determined that defendant's actions were intentional or knowing (murder, voluntary manslaughter) and unintentional (involuntary manslaughter).

(See Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a), 9-2(b), 9-3; *People v. Cowen* (1979), 68 Ill. App. 3d 437, 386 N.E.2d 435.) In our opinion, this confusion on the part of the trier of fact, as evidenced by legally and logically inconsistent verdicts, requires reversal and remandment to the trial court for a new trial. (*People v. Frias* (1983), 99 Ill. 2d 193, 203, 457 N.E.2d 1233.) Defendant notably has not challenged the sufficiency of the evidence against him.

We note that the inconsistent verdicts in this case may have stemmed, in part, from the statutory definitions of murder and involuntary manslaughter and from the recommended forms of verdict in Illinois Pattern Jury Instructions, Criminal (2d ed. 1981) on these two offenses. This problem is extensively discussed in two recent law review articles. (See Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 Chi.-Kent L. Rev. 23 (1982); O'Neill, *"With Malice Toward None": A Solution to an Illinois Homicide Quandary*, 32 De Paul L. Rev. 107 (1982).) To avoid the result of inconsistent guilty verdicts being returned by a jury in murder-manslaughter cases some trial judges have utilized the number of verdict forms contained in the original edition of Illinois Pattern Jury Instructions, Criminal (1968), which recommends only three forms of verdict in a murder-manslaughter case, *i.e.* guilty of murder, guilty of voluntary manslaughter, and not guilty, and the jury is further instructed to select and sign only the one form reflecting their verdict. (See IPI Criminal No. 27.01, Sample Set of Instructions (1968).) In the case at bar, however, the trial judge gave six forms of verdicts to the jury, three guilty and three not guilty verdicts, as recommended in IPI Criminal No. 27.01, Sample Set of Instructions (2d ed. 1981). This approach may have contributed to the inconsistent verdicts obtained here.

For the foregoing reasons, the order vacating the convictions for voluntary manslaughter and involuntary manslaughter is set aside. The convictions for murder, voluntary manslaughter, and involuntary manslaughter are reversed and the cause remanded for a new trial.

Reversed and remanded.

REINHARD and VAN DEUSEN, JJ., concur.

APPENDIX B

(Nos. 59927, 59947 cons.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee and Appellant,
v.
DONALD HOFFER,
Appellant and Appellee.

Opinion filed March 29, 1985.—Rehearing denied May 31, 1985.

* * *

JUSTICE MORAN delivered the opinion of the court:

The defendant, Donald Hoffer, was indicted by the grand jury of Kane County on three counts of murder. (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a)(1), 9-1(a)(2).) After a jury trial, defendant was found guilty of murder (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a)(1), 9-1(a)(2)), voluntary manslaughter (Ill. Rev. Stat. 1981, ch. 38, par. 9-2(b)), and involuntary manslaughter (Ill. Rev. Stat. 1981, ch. 38, par. 9-3(a)). The court entered judgment on each finding. Defendant then moved to vacate the judgments of conviction entered for murder and voluntary manslaughter, in that the judgments, with respect to these two convictions, were inconsistent. Following post-trial motions, the court vacated the judgments of conviction for voluntary and involuntary manslaughter, entering judgment on the murder conviction and sentencing defendant to a prison term of 20 years. The appellate court set aside the trial court's order vacating the voluntary- and involuntary-manslaughter convictions and reversed all three convictions, remanding the cause for a new trial. (122 Ill. App. 3d 13.) We allowed the petitions for leave to appeal of the defendant (No.

59927) and the State (No. 55947) (87 Ill. 2d R. 315(a)) and consolidated the causes for purposes of review. James J. Doherty, public defender of Cook County, was allowed to file an *amicus curiae* brief on behalf of the defendant.

Two issues are presented: (1) whether the three jury verdicts of guilty were legally inconsistent so as to require a new trial; and (2) whether remanding the cause for a new trial would violate principles of collateral estoppel and defendant's right to be free from double jeopardy.

The record reveals the following. Catherine Einsiedel, defendant's sister, testified at trial that she had known the victim, Harold (Ed) Peters, for three years. During that period, she lived with Peters but would periodically move in with the defendant when she and Peters had an argument. Peters was the father of Einsiedel's daughter, Shannon. She and Shannon had moved out of Peters' house and into the defendant's residence approximately three months prior to the time of the homicide. She did occasionally see Peters, however, during this three-month period.

Einsiedel's testimony indicates that on the evening of May 18, 1982, a friend, Tony Charbauski, visited her at the defendant's residence. During the evening, Peters entered the defendant's house through a window and went upstairs, where he confronted Einsiedel and Charbauski in her bedroom. Peters began yelling and attempted to engage Charbauski in a fight. Charbauski told Einsiedel to call the police. She stated that she did so, as she was concerned that someone might get hurt. Although Peters was attempting to kick and otherwise provoke him, Charbauski was able to get down the stairs and safely out of the house. Peters went back into the house, where he asked Einsiedel if their relationship was ended. When she answered affirmatively, Peters took a flashlight he was

carrying and broke the dust cover on a nearby stereo. Before Peters left, he gave Einsiedel some money and told her that he would pay for the damage to the stereo. The police arrived minutes later. Einsiedel gave them the names of Peters and Charbauski, but she refused to file charges.

A short time later, the defendant returned home. Einsiedel related the events of the evening to him. According to her testimony, the defendant stated that he was sick of Peters breaking things and also, "he'd be ready for him when he came back after the bars closed." The defendant denied making this statement.

Einsiedel and the defendant then went to their rooms. Einsiedel testified that about an hour later she heard the defendant say that Peters was back and she'd better get downstairs. When she got downstairs, she observed the defendant standing on the porch in his underwear, holding a shotgun. Peters was standing below the defendant, approximately five feet away. After an exchange of words, Peters turned his back on the defendant and threw his arms in the air. According to Einsiedel it was at this point that she yelled, "Don, don't do it; don't do it; don't shoot." Seconds later the gun went off and Peters was fatally wounded.

The defendant testified that when Peters began walking down the porch stairs, it appeared that he had been drinking. The defendant further testified that, in the past, he had observed Peters become more violent when he had been drinking. According to defendant, his gun was then pointing straight up and was resting on his shoulder. He then heard his sister call his name and he began to turn to look at her when he heard her say "Don't shoot." When he looked back, Peters was bringing his hands down and turning around. Defendant stated that he thought

Peters was reaching for a gun because he knew that Peters owned and carried guns, was skilled in using them, and had previously threatened him with a gun. The defendant began to lower the gun with one hand, while reaching with his other hand to grab the stock, when the gun went off and Peters was struck. Although the defendant testified that Peters was facing him when the gun discharged, a pathologist testified that the autopsy indicated that Peters was shot in the back. The pathologist also testified that Peters was intoxicated at the time he was shot.

The court instructed the jury that the defendant was charged with the offense of murder, which includes the offenses of voluntary and involuntary manslaughter. (Illinois Pattern Jury Instructions (IPI), Criminal, No. 2.01 (2d ed. 1981).) Definitional and issues instructions were tendered to the jury on murder, voluntary manslaughter (unreasonable belief), and involuntary manslaughter. The issues instruction on voluntary manslaughter required the jury to find that, at the time the defendant performed the acts which caused the death of Peters, defendant *believed* that circumstances existed which would have justified the killing. In addition, the jury would have to find that this belief was unreasonable. IPI Criminal 2d No. 7.06.

The issues instruction on murder was fashioned after the murder instruction recommended in the 1968 edition of the criminal Illinois Pattern Jury Instructions where the affirmative defense of self-defense is raised (IPI Criminal No. 27.01 (7.02 and 25.05) (1968)). To find the defendant guilty of murder by following this instruction, the jury would have to find that the defendant was not justified in using the force which he used, and that the defendant *did not believe* that circumstances existed which justified the use of such force. It should be noted that the

issue instruction for murder (where self-defense is raised) in the 1981 (2d) edition of IPI Criminal does not require the jury to make a finding regarding the absence of a belief by the defendant that justifiable circumstances existed. IPI Criminal 2d No. 27.01 (7.02 and 24-25.06A).

Further, the issues instructions on murder and voluntary manslaughter, on the other hand, required that the State prove the defendant performed the acts which caused the death of the victim and that defendant did so either intending to kill or do great bodily harm, or knowing that his acts would cause or create a strong probability of death or great bodily harm.

Finally, the jury was given the definitional and issues instructions on involuntary manslaughter. The definitional instruction made it clear that involuntary manslaughter is caused unintentionally, although without lawful justification, by acts which are performed recklessly and are likely to cause death or great bodily harm. (IPI Criminal 2d No. 7.07.) The issues instruction on involuntary manslaughter required the State to prove that the defendant performed the acts which caused the death of the victim and that he performed those acts recklessly. In addition the State would have to prove that those acts were likely to cause death or great bodily harm. IPI Criminal 2d No. 7.08.

The State maintains that the appellate court erred in remanding the cause for a new trial. In its brief before this Court, the State argues that the conviction for murder was legally consistent with the guilty verdicts for voluntary and involuntary manslaughter. The jury was instructed that "[t]he defendant is charged with the offense of murder, which includes the offenses of voluntary manslaughter and involuntary manslaughter." (IPI Criminal 2d No. 2.01.) Further, the jurors were given verdict forms

(six) of guilty and not guilty of murder, voluntary manslaughter and involuntary manslaughter but were not informed that they could return a guilty verdict on only one of the offenses. (IPI Criminal 2d Nos. 26.01, 26.02, 26.05.) Based on the above, the State, therefore, concludes that the jury was not confused when it returned guilty verdicts for murder and each of the lesser included offenses of voluntary and involuntary manslaughter. These verdicts, reasons the State, "were the jury's clear expression that Hoffer was to be held responsible for homicide and this necessarily included each of its progressive degrees."

This rationale suggests that because voluntary manslaughter is a lesser included offense of murder (*People v. Fausz* (1983), 95 Ill. 2d 535, 539; *People v. Pierce* (1972), 52 Ill. 2d 7, 11), and involuntary manslaughter is a lesser included offense of both voluntary manslaughter and murder (*People v. Taylor* (1973), 54 Ill. 2d 558, 560; *People v. Arndt* (1972), 50 Ill. 2d 390, 394), the mental state required for murder "subsumed the lesser mental states required for voluntary manslaughter and involuntary manslaughter." Thus, concludes the State, the guilty verdicts were only logically inconsistent and under *People v. Hairston* (1970), 46 Ill. 2d 348, 362-63, and *People v. Frias* (1983), 99 Ill. 2d 193, 203, reversal and a new trial are not proper.

We would agree with the State that the three guilty verdicts reached by the jury may have been a predictable outcome, considering the tendering of the lesser included offense instruction in conjunction with the six verdict forms. Nevertheless, we do not agree with the State that the three jury verdicts were legally consistent.

An "included offense" is defined in Illinois as an offense which "[i]s established by proof of the same or less than

all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged * * *." (Ill. Rev. Stat. 1981, ch. 38, par. 2-9(a).) The offenses of murder, voluntary manslaughter and involuntary manslaughter are distinguished only by the diminishing degree of mental culpability necessary to sustain each. While murder and voluntary manslaughter (unreasonable belief) both require proof of intent or knowledge (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1 (a)(1), 9-1(a)(2), 9-2(b)), the offense of voluntary manslaughter is committed only when the defendant acts with an unreasonable belief that the killing was justified. This mental state is considered less culpable, and, as such, voluntary manslaughter is considered an included offense of murder. Similarly, involuntary manslaughter is considered an included offense of voluntary manslaughter and murder because it involves an unintentional killing of a human being without lawful justification while recklessly performing acts which are likely to cause death or great bodily harm. Ill. Rev. Stat. 1981, ch. 38, par. 9-3(a).

The mental states involved in each of these offenses are mutually inconsistent. Where a determination is made that one exists, the others, to be legally consistent, must be found not to exist. This is made especially clear in the instant case, where the jury received an issue instruction on murder which required the State to prove that the defendant *did not believe* that circumstances existed which justified the use of force. (IPI Criminal No. 27.01 (7.02 and 25.05) (1968).) By finding the defendant guilty of murder, therefore, the jury specifically found that defendant did not believe his conduct was justified. At the same time, by finding him guilty of voluntary manslaughter, the jury determined that he did believe, although unreasonably, that his conduct was justified. Additionally, the jury

concluded that the defendant killed another, intentionally or knowingly (murder, voluntary manslaughter) while simultaneously finding that defendant recklessly but unintentionally caused the death of the victim (involuntary manslaughter).

This court adheres to the view that "where inconsistent verdicts of guilty are returned, a reversal and new trial on all counts must follow." (*People v. Frias* (1983), 99 Ill. 2d 193, 203; *People v. Hairston* (1970), 46 Ill. 2d 348, 361.) Because we conclude that the verdicts rendered by the jury were legally and logically inconsistent, we find that reversal and a new trial are required.

In what appears to be an alternative argument, the State maintains that, while the mental states for murder and voluntary manslaughter may be inconsistent, the conviction for murder should be upheld because instructions for voluntary manslaughter were not warranted on the facts of this case. In addition, the State contends that the mental states for murder and involuntary manslaughter are not inconsistent since lack of intent is not a necessary element of involuntary manslaughter. We do not agree.

This court has held in murder cases "that if there is evidence in the record which, if believed by a jury, would reduce the crime to manslaughter, an instruction defining manslaughter should be given." (*People v. Lockett* (1980), 82 Ill. 2d 546, 550. See *People v. Ward* (1984), 101 Ill. 2d 443, 451.) In the instant case, there was ample evidence to support the tendering of a manslaughter instruction. As stated above, defendant was aware that Peters owned guns and had threatened him, on a prior occasion, with a gun. In addition, defendant was aware that Peters knew how to use guns and became violent when intoxicated. (See *People v. Lynch* (1984), 104 Ill. 2d 194.) Further, the State's argument that murder and involuntary manslaugh-

ter do not have inconsistent mental states is contrary to the language of the involuntary-manslaughter statute (Ill. Rev. Stat. 1981, ch. 38, par. 9-3(a)), which defines the offense as an unintentional killing (*People v. Fernetti* (1984), 104 Ill. 2d 19, 25).

Having concluded, therefore, that the legally inconsistent verdicts require reversal and a new trial, we need address defendant's argument that remanding the cause for a new trial violates principles of collateral estoppel and his right to be free from double jeopardy. The premise of defendant's argument is that the jury's verdict, finding him guilty of the lesser included offense of involuntary manslaughter, negates the existence of the intent element of murder and voluntary manslaughter and, therefore, impliedly acquitted him of the greater offenses. Thus, defendant contends, to remand the cause and relitigate the charged offense of murder, as well as the included offenses of voluntary and involuntary manslaughter, would offend both Federal and State double jeopardy guarantees (U.S. Const., amend. V; Ill. Const. 1970, art. I, sec. 10), as well as Illinois statutory law (Ill. Rev. Stat. 1981, ch. 38, par. 3-4(a)).

The constitutional prohibition of double jeopardy protects a defendant from prosecution of an offense after acquittal or conviction of the same offense and prohibits multiple punishments for the same offense. (*Illinois v. Vitale* (1980), 447 U.S. 410, 415, 65 L. Ed. 2d 228, 235, 100 S. Ct. 2260, 2264.) Section 3-4(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 3-4(a)) provides, in relevant part, that "[a] conviction of an included offense is an acquittal of the offenses charged." Defendant relies on this statutory provision and the "implicit acquittal" principle enunciated in *Green v. United States* (1957), 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221, in support

of his double-jeopardy argument. We find that reliance on both the statute and the principle of law set forth in *Green* is misplaced.

In *Green*, the defendant was charged with arson and murder in the first degree. The jury was instructed that it could find the defendant guilty of arson under the first count and either first- or second-degree murder under the second count. Defendant Green was found guilty of arson and second-degree murder. The verdict was silent as to the charge of murder in the first degree. Defendant appealed the second-degree-murder conviction. The conviction was reversed and the cause remanded for a new trial. Although defendant raised the defense of former jeopardy in his second trial, he was tried again for first-degree murder and found guilty on that charge. The Supreme Court found that the constitutional prohibition against double jeopardy had been violated since the jury had implicitly acquitted defendant on the charge of first-degree murder by finding him guilty of second-degree murder.

> "In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.' " 355 U.S. 184, 191, 2 L. Ed. 2d 199, 206, 78 S. Ct. 221, 225.

To apply this rationale to the facts of the instant case is to ignore the jury's express findings of guilt as to the offenses of murder and voluntary manslaughter. We agree with the appellate court, therefore, that, under the circumstances of this case, application of the doctrine of implied acquittal would be fictional. Similarly, we find that the established principle of law codified in section 3-4(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 3-4(a)), wherein conviction of a lesser offense operates

as an acquittal of the greater offense (*People ex rel. Daley v. Limperis* (1981), 86 Ill. 2d 459, 466), cannot rationally be applied where, as here, a jury returns verdicts of guilty not only on the offense charged but also on the uncharged lesser included offenses. We find that the statutory provision applies only when the jury returns a guilty verdict on a lesser offense and is silent as to the charged offense.

Defendant further argues that the principle of collateral estoppel, which is embodied in the double jeopardy clause (*Ashe v. Swenson* (1970), 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189), bars defendant's retrial for murder and voluntary manslaughter. The court in *Ashe* stated that the principle of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (397 U.S. 436, 443, 25 L. Ed. 2d 469, 475, 90 S. Ct. 1189, 1194.) Defendant maintains that in finding him guilty of involuntary manslaughter, the jury found that he had acted unintentionally and recklessly. Thus, defendant concludes, this factual finding negates the accusation that he acted with intent or knowledge and estops the State from relitigating those mental states anew.

The jury, in the instant case, had to make a factual determination as to the mental state of the defendant at the time of the homicide. By finding defendant guilty of the charged offenses as well as the two included offenses, the jury necessarily found that the defendant possessed three distinct and mutually inconsistent mental states at the time of the offense. As such, we found the verdicts legally inconsistent. Implicit in the rule of law which requires a new trial when multiple guilty verdicts are legally inconsistent is the invalidity of the underlying factual find-

ings upon which the verdicts were made. In the instant case, there has been no valid and final judgment and thus no ultimate factual determination upon which to rely for purposes of collateral estoppel.

We note that the *amicus curiae* brief of the public defender urges this court to find that verdicts of guilty of murder and guilty of voluntary manslaughter are legally and logically consistent. This view is based upon the issues instruction for murder prescribed in the second (1981) edition of IPI Criminal where self-defense is raised. (IPI Criminal 2d No. 27.01 (7.02 and 24-25.06A).) Because this instruction does not include the "lack of belief in justification" element, the instruction for voluntary manslaughter (IPI Criminal 2d No. 7.06) includes *all* of the elements of murder *plus* the additional elements of provocation or unreasonable belief in the necessity to act in self-defense. As such, *amicus curiae* maintains that guilty verdicts on each offense are consistent, since the jury has necessarily found all the elements of murder, accompanied by mitigating circumstances. He concludes, therefore, that judgment must be entered and sentence imposed on the less serious offense of voluntary manslaughter. (He also agrees with defendant that, in this case, judgment should be entered on the involuntary-manslaughter conviction, although he does not provide any reasoning to support this position.)

As discussed above, the jury in the instant case received an issue instruction for murder which *did* include the "lack of belief in justification" element. As such, the argument asserted by *amicus curiae* is inapplicable to the facts of this case and, accordingly, does not persuade. We view with concern, however, the significant number of cases in which juries are finding defendants guilty of both murder and voluntary or involuntary manslaughter. (See,

e.g., *People v. Washington* (1984), 127 Ill. App. 3d 365; *People v. Milner* (1984), 123 Ill. App. 3d 656; *People v. Kendricks* (1984), 121 Ill. App. 3d 442; *People v. Fox* (1983), 114 Ill. App. 3d 593; *People v. Stuller* (1979), 71 Ill. App. 3d 118.) We would suggest that this phenomenon results from the failure to apprise the jury of the distinct and mutually exclusive mental states necessary to support findings of guilty for the offenses of murder, voluntary manslaughter and involuntary manslaughter. Also contributing to the inconsistent verdicts, as mentioned by the appellate court, is the recommended forms of verdict in murder-manslaughter cases. (See *People v. Glass* (1984), 128 Ill. App. 3d 869, and *People v. Almo* (1984), 123 Ill. App. 3d 406, wherein the juries in murder-manslaughter cases demonstrated their confusion as to the proper procedure for deliberation by inquiring of the court whether it was necessary to return verdicts on each charge.) It follows that amendment of the pattern instruction is needed.

For the reasons stated above, the judgment of the appellate court, reversing the circuit court and remanding the cause for a new trial, is affirmed.

Judgment affirmed.

APPENDIX C

59927
59947
Cons.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

May 31, 1985

Mr. Ralph Ruebner
Associate Prof. of Law
The John Marshall Law School
315 S. Plymouth Court
Chicago, IL 60604

Nos. 59927 — People State of Illinois, et al., appellees, v.
59947 Donald Hoffer, et al., appellants. Appeal,
Cons. Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 10, 1985.

C2

State of Illinois
SUPREME COURT CLERK
Supreme Court Building
Springfield 62706

June 10, 1985

Alms & Miller
Mr. Randy K. Johnson
257 E. Main St., S#301
Barrington, IL 60010

Prof. Ralph Ruebner
John Marshall Law School
315 S. Plymouth Court
Chicago, IL 60604

In re: Nos. 59927 & 59947 Cons.—People State of Illinois, appellee, v. Donald Hoffer, appellant.

Counsel:

We are enclosing a copy of an order entered by Justice Moran in the above entitled cause.

A certified copy of the order has been forwarded to the Clerk of the Appellate Court, Second District and to the Circuit Court of Kane County.

Very truly yours,

Clerk of the Supreme Court

cc: Cook PD. (Robert J. Isaacson)
AG/Crim. (Jack Donatelli)
SAASC/Elgin (Phyllis J. Perko)
Robert J. Morrow

JH/dem

C3

NOS. 59927 & 59947 CONS.

IN THE
SUPREME COURT OF ILLINOIS

People State of Illinois, *Appellee*	)	Appellate Court Second District 2-82-0888
v.	)	
Donald Hoffer, *Appellant*	)	

ORDER

This matter has come for consideration upon the motion of Appellant to stay the mandate of this Court and to continue bond pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed and bond is continued pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed and bond will continue pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought and the bond shall be revoked.

[FILED JUNE 10, 1985]

APPENDIX D

A person commits the offense of Murder when he kills an individual without lawful justification if, in performing the acts which cause the death,

he intends to kill or do great bodily harm to that individual or another;

or

he knows that such acts will cause death to that individual or another;

or

he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

[FILED SEPTEMBER 17, 1982]

D2

To sustain the charge of murder, the State must prove the following propositions:

FIRST: That the defendant performed the acts which caused the death of Harold Edward Peters; and

SECOND: That when the defendant did so,

1. he intended to kill or do great bodily harm to Harold Edward Peters;

or

2. he knew that his act would cause death or great bodily harm to Harold Edward Peters;

or

3. he knew that his acts created a strong probability of death or great bodily harm to Harold Edward Peters;

THIRD: That the defendant did not believe that circumstances existed which justified the use of force which he used;

FOURTH: That the defendant acted without lawful justification in using the force which he used.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

[FILED SEPTEMBER 17, 1982]

D3

A person commits the crime of voluntary manslaughter when he kills an individual if, in performing the acts which cause the death,

1. he intends to kill or do great bodily harm to that individual or another;

or

2. he knows that such acts will cause death to that individual or another;

or

3. he knows that such acts create a strong probability of death or great bodily harm to that individual or another;

and at the time of the killing he believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable.

[FILED SEPTEMBER 17, 1982]

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

FIRST: That the defendant performed the acts which caused the death of Harold Edward Peters; and

SECOND: That when defendant did so,

1. he intended to kill or do great bodily harm to Harold Edward Peters;

or

2. he knew that his acts would cause death or great bodily harm to Harold Edward Peters;

or

3. he knew that his acts created a strong probability of death or great bodily harm to Harold Edward Peters; and

THIRD: That when the defendant did so he believed that circumstances existed which would have justified killing Harold Edward Peters; and

FOURTH: That the defendant's belief that such circumstances existed was unreasonable.

FIFTH: That the defendant acted without lawful justification in using the force which he used.

If you find from your consideration of all the evidence that each one of the propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

[FILED SEPTEMBER 17, 1982]

D5

A person commits the offense of involuntary manslaughter when he unintentionally causes the death of an individual without lawful justification by acts which are performed recklessly and are likely to cause death or great bodily harm to another.

[FILED SEPTEMBER 17, 1982]

To sustain the charge of involuntary manslaughter, the State must prove the following propositions:

FIRST: That the defendant performed the acts which caused the death of Harold Edward Peters; and

SECOND: That the defendant performed those acts recklessly; and

THIRD: That those acts were likely to cause death or great bodily harm.

FOURTH: That the defendant acted without lawful justification in using the force which he used.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

[FILED SEPTEMBER 17, 1982]

We, the jury, find the defendant Donald Hoffer, Guilty of the offense of voluntary manslaughter.

Foreperson

JUDGMENT

ON THE VERDICT
This 17th Day of Sept., 1982

Judge

[FILED SEPTEMBER 17, 1982]

D8

We, the jury, find the defendant Donald Hoffer, Guilty of the offense of involuntary manslaughter.

Foreperson

JUDGMENT

ON THE VERDICT

This 17th Day of Sept., 1982

Judge

[FILED SEPTEMBER 17, 1982]

D9

We, the jury find the defendant Donald Hoffer, Guilty of the offense of murder.

Foreperson

JUDGMENT

ON THE VERDICT
This 17th Day of Sept., 1982

Judge

[FILED SEPTEMBER 17, 1982]

D10

We, the jury, find the defendant Donald Hoffer, Not Guilty of the offense of involuntary manslaughter.

_____
Foreperson

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

[FILED SEPTEMBER 17, 1982]

D11

We, the jury, find the defendant Donald Hoffer, Not Guilty of the offense of voluntary manslaughter.

_____
Foreperson

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

[FILED SEPTEMBER 17, 1982]

D12

We, the jury, find the defendant Donald Hoffer, Not Guilty of the offense of murder.

_____
Foreperson

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

[FILED SEPTEMBER 17, 1982]

Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD S. HOFFER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA J. STEWART
Solicitor General, State of Illinois
MARK L. ROTERT *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570
Counsel for Respondent

JACK DONATELLI
Assistant Attorney General
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 32964—50—9-6-85)

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Can the implied acquittal doctrine prevent retrial on charges for murder, voluntary manslaughter, and involuntary manslaughter although there has been no acquittal and the jury found petitioner guilty on all counts in violation of state law?

Does collateral estoppel prevent that retrial although the multiple guilty verdicts were neither valid nor final because the underlying factual findings that petitioner possessed three distinct and mutually inconsistent mental states at the time he fired the single shot are legally inconsistent?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
PRAYER	1
OPINION BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION:	
NEITHER THE IMPLIED ACQUITTAL DOCTRINE NOR COLLATERAL ESTOPPEL PREVENT RETRIAL WHERE THERE HAS BEEN NO ACQUITTAL AND NO VALID, FINAL JUDGMENT; THUS, THE PETITION DOES NOT DEMONSTRATE A CONFLICT, A CONSTITUTIONAL ERROR, OR AN UNFAIR RESULT TO JUSTIFY A GRANT OF REVIEW ..	3
CONCLUSION	6

TABLE OF AUTHORITIES

	PAGE
Ashe v. Swenson, 397 U.S. 436 (1970)	5, 6
Green v. United States, 355 U.S. 184 (1957) ...	4
Price v. Georgia, 398 U.S. 323 (1970)	4, 5

No. 85-128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD S. HOFFER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The People of the State of Illinois ask this Court to deny the petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois, which remanded this cause for a new trial because it does not present an issue worthy of review.

OPINION BELOW

The opinion below is reported at *People v. Hoffer*, 106 Ill.2d 186, 478 N.E.2d 335 (1985) and is attached to Hoffer's petition as Appendix B.

JURISDICTION

Hoffer invokes jurisdiction under 28 U.S.C. §1257(3) but, as the following argument demonstrates, Hoffer has not provided any reason for this Court to exercise its discretion to grant the petition for writ of certiorari.

STATEMENT OF THE CASE

A Kane County, Illinois jury found Donald Hoffer guilty of murder, voluntary manslaughter, and involuntary manslaughter, all in connection with the shooting death of Harold Peters. The trial court entered judgment on each verdict, then vacated the convictions for voluntary manslaughter and involuntary manslaughter and retained the judgment for conviction of murder and sentenced Hoffer to 20 years imprisonment.

On direct appeal, the Illinois Appellate Court, Second District, made a finding of inconsistent verdicts, reversed all the convictions, and remanded for a new trial.

The Supreme Court of Illinois granted leave to appeal and affirmed the judgment of the appellate court, reversing the circuit court and remanding for new trial. The court denied Hoffer's petition for rehearing. The mandate issued June 10, 1985.

Hoffer filed a petition with this Court July 19, 1985, seeking review therefrom.

REASONS FOR DENYING THE PETITION

NEITHER THE IMPLIED ACQUITTAL DOCTRINE NOR COLLATERAL ESTOPPEL PREVENT RETRIAL WHERE THERE HAS BEEN NO ACQUITTAL AND NO VALID, FINAL JUDGMENT; THUS, THE PETITION DOES NOT DEMONSTRATE A CONFLICT, A CONSTITUTIONAL ERROR, OR AN UNFAIR RESULT TO JUSTIFY A GRANT OF REVIEW.

Petitioner Donald Hoffer does not present an issue worthy of review. He has not demonstrated a conflict among jurisdictions, an error by the Illinois courts in interpreting the American Constitution, or an unjust result in his own case.

In the case at bar, the Supreme Court of the State of Illinois declared that the mental states involved in murder, voluntary manslaughter, and involuntary manslaughter are mutually inconsistent as a matter of state law. Thus, when an Illinois jury returns inconsistent guilty verdicts for murder, for voluntary manslaughter, and for involuntary manslaughter, a reversal and new trial on all counts must follow.

The Illinois courts have rejected Hoffer's contention that a retrial violates the implied acquittal doctrine and principles of collateral estoppel and therefore his right to be free from double jeopardy under the fifth amendment. The implied acquittal doctrine, as enunciated by this Court in *Green v. United States*, 355 U.S. 184 (1957) and *Price v. Georgia*, 398 U.S. 323 (1970), is not invoked in the facts at bar. Green had been found guilty of second degree murder but the jury was silent as to the charge of first degree murder. After an appeal wherein his conviction was reversed and the cause remanded for new trial, Green was subsequently found guilty of first degree murder. This Court held that the double jeopardy clause prohibited this second finding because the first jury had by its silence impliedly acquitted Green of murder in the first degree.

Price was charged with murder but found guilty of voluntary manslaughter. His jury was also silent as to the murder charge. After successful appeal, he was retried for murder, although the jury once again found only voluntary manslaughter. Nonetheless, retrial for murder violated the double jeopardy clause as in *Green* where the first verdict was by jury silence limited to the lesser offense.

But this didn't happen in Hoffer's case. There was no jury silence. There was nothing implied. Hoffer's jury declared him guilty of all three offenses. These verdicts are explicit convictions, not implicit acquittals. The Illinois court quite properly acknowledged the jury's express findings of guilt as to murder and voluntary manslaughter, refusing to participate in the fiction proffered by Hoffer that his jury implied his acquittal on those charges. Hoffer's suggestion was not rational.

This is consistent with both *Green* and *Price*. According to these cases, jeopardy ends with an acquittal—whether that acquittal is express or implied. *Price*, 398 U.S. at 329. But since Hoffer's jury did not acquit him on any count, the implied acquittal doctrine is not invoked. Until he is acquitted, Hoffer remains in jeopardy. Thus, the order of retrial on all counts is fair. Hoffer has cited no authority from any jurisdiction that has accepted his version of the implied acquittal principle. The People of Illinois suggest that this is because an attempt to extend to explicit but inconsistent guilty verdicts a rule that is premised on jury silence is patently not rational.

Therefore, there is no conflict among jurisdictions to be resolved, no misinterpretation of the Constitution to be corrected, and no unfair result to be prevented. Reliance on the implied acquittal provides no reason for this Court to accept review of this cause.

Hoffer's invocation of the doctrine of collateral estoppel is equally unavailing. The doctrine prevents any relitigation of ultimate issues of fact between the same parties once there has been a resolution by valid and final judgment. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). However, the guilty verdicts rendered at bar were neither valid nor final. The underlying factual findings on which the multiple verdicts were premised—that Hoffer possessed three distinct and mutually inconsistent mental states at the time he fired the single shot—are legally inconsistent, thus invalid and not final. The issue of the mental state, certainly an ultimate issue of fact, has not been resolved.

The Illinois court expressly rejected Hoffer's argument that the factual finding as to the mental state for involuntary manslaughter, i.e., that he acted unintentionally and recklessly, negated the factual findings that he acted with

intent or knowledge. This contention ignores actual factual findings to the contrary, and would result in a decision not based on realism and rationality as contemplated by *Ashe*, 397 U.S. at 444.

Once again, Hoffer cites not one case where the collateral estoppel doctrine has prevented retrial upon legally inconsistent verdicts. Since there is no conflict among jurisdictions for this Court to resolve, no misinterpretation of the Constitution for it to correct, and no unfair result for it to prevent, a claim resting on collateral estoppel provides no reason for this Court to intervene.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA J. STEWART
Solicitor General, State of Illinois
MARK L. ROTERT *
Assistant Attorney General
Counsel for Respondent

JACK DONATELLI
Assistant Attorney General
Of Counsel

* Counsel of Record